

## MEMORANDUM

**TO:** House Judiciary Committee Members

**FROM:** Coalition for Adoption Rights Equality, Inc.  
Pepper Hamilton LLP

**DATE:** April 22, 2009

**RE:** House Bill 4131 and Michigan Constitutional Amendment, Art. Sec. 25

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### MEMORANDUM OF LAW

#### I. INTRODUCTION

HB 4131 will simply amend current Michigan adoption laws (MCL 710.24 and 710.51) to clarify that: "...[t]wo unmarried persons may petition to adopt a child...." A question has been raised as to whether explicitly permitting two unmarried people to adopt a child would violate Michigan's constitutional amendment (MCLA Const Art 1 Section 25, referred to herein as the "Constitutional Amendment"), which states that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." This concern is meritless. HB 4131 does not violate the Constitutional Amendment because it does not recognize a relationship that is similar to marriage. Rather, HB 4131 simply clarifies that any two unmarried persons have legal standing to file a petition for joint adoption.

More importantly, HB 4131 is in the best interests of Michigan children. Under HB 4131, unmarried parents and other pairs of individuals with a common interest in the well-being of a child such as an aunt and grandmother, would be allowed to jointly adopt a child. This will expand the number of available homes for adoption. Moreover, "for each foster child placed in an adoptive home, the public saves more than \$40,000 by the time the child placed for adoption at 6.6 years of age reaches age 18." Richard P. Barth, Chung Kwon Lee, Judith

Wildfire and Shenyang Guo, *A Comparison of the Governmental Costs of Long-Term Foster Care and Adoption*, Social Service Review, March 2006, at 131. Under HB 4131, a second parent will be able to legally adopt a child that he/she is already raising with a partner. This provides such children with the financial, legal and emotional security of having two parents legally responsible for their care. In the event of separation of the parents or the death of a parent, a child will have the security of two parents who have a legal and financial responsibility to support that child. Finally, state and national experts publicly endorse second parent adoption.<sup>1</sup>

## **II. MICHIGAN'S CURRENT ADOPTION LAW**

Michigan's adoption statutes do not prevent unmarried persons from filing for joint adoption. There is nothing in the language of Section 710.24(1) that limits the discretion of judges to grant second parent adoptions where necessary to protect the best interests of the children involved. See Section 710.24(1) ("If a person desires to adopt a child...that person, together with his wife or her husband, *if married*, shall file a petition with the court.")(emphasis added). HB 4131 simply makes explicit what is currently implicit in the current law so that there can be no question as to the legal standing of unmarried people to jointly adopt.<sup>2</sup>

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<sup>1</sup> National experts including the American Pediatric Association, American Psychological Association, Child Welfare League of America, North American Council on Adoptable Children and the American Academy of Family Physicians endorse second parent adoptions. Michigan's National Association of Social Workers, State Bar of Michigan Family Law Section, Michigan Psychiatric Society, Jewish Family Services, and the Michigan Association of Infant Mental Health have publicly endorsed second parent adoption

<sup>2</sup> *In re Adams*, 189 Mich App 540 (1991) may come to the Committee's attention. In that case, the Michigan Court of Appeals affirmed the trial court's decision that natural parents, who were married, but not to each other, were precluded from adopting their natural adult daughter, even though all interested parties, including the parents' spouses, had joined in the petition and consented to the proposed adoption. There is dictum in the decision that suggests that unmarried persons could not jointly adopt. *In re Adams* at 544. However, at the time *In re Adams* was decided, the legislature had not yet authorized direct placement adoptions in contexts other than stepparent adoptions, and, therefore, the current statutory procedures used to secure direct placement adoptions for children who are being raised by two unmarried parents did not yet exist. In fact, if the dictum from *In re Adams* was applied to Michigan's current adoption code, it would effectively nullify the 1995 amendments by restoring the very  
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Courts in other states interpreting language similar to Michigan's adoption statute have uniformly concluded that the plain language and purpose of these statutes permits joint adoptions by two unmarried persons. See e.g., *In the Matter of Jacob/In the Matter of Dana*, 660 NE2d 397 (NY 1995) (interpreting similar statute to permit second parent adoptions)<sup>3</sup>; *Adoption of Two Children by HNR*, 666 A2d 535 (NJ App 1995) (same)<sup>4</sup>; *In re M.M.D. & B.H.M.*, 662 A2d 837 (DC App 1995) (same)<sup>5</sup>; *In re Petition of KM & DM*, 653 NE2d 288 (Ill App Ct 1995) (same);<sup>6</sup> *Adoption of Tammy*, 619 NE2d 315 (Mass 1993) (same)<sup>7</sup>; and *Adoptions of BLVB & ELVB*, 628 A2d 1271 (Vt 1993) (same)<sup>8</sup>. Michigan appellate courts have not issued a decision that squarely addresses the issue of whether the adoption law, as amended in 1995, specifically

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restriction (i.e. no direct placement adoption unless there is a stepparent situation) that the legislature specifically eliminated in 1995.

<sup>3</sup> The New York statute regarding who may adopt provides: "an adult unmarried person or an adult husband and his adult wife together may adopt another person." NY Dom Rel Law Section 110.

<sup>4</sup> The New Jersey statute regarding adoption provides: "Any person may institute an action for adoption except that a married person may do so only with the written consent of his spouse in the same action or if living separate and apart from his spouse." NJSA 9:3-43a.

<sup>5</sup> The D.C. Code provision regarding who can adopt provides: "Any person may petition the court for a decree of adoption. A petition may not be considered by the court unless petitioner's spouse, if he has one, joins in the petition..." DC Code Section 16-302.

<sup>6</sup> "A reputable person of legal age and of either sex, provided that such person is married, his or her spouse shall be a party to the adoption proceeding, including a husband or wife desiring to adopt a child of the other spouse, in all of which cases the adoption shall be by both spouses jointly." 750 ILC 50/2(A).

<sup>7</sup> Massachusetts' statute regarding who may adopt provides: "A person of full age may petition the probate court in the county where he resides for leave to adopt as his child another person younger than himself...If the petitioner has a husband or wife living, competent to join in the petition, such husband or wife shall join therein, and upon adoption the child shall in law be the child of both..." MGLA Chp 210, Section 1.

<sup>8</sup> Vermont's statute states: "A person or husband and wife together...may adopt any other person...A married man or married woman shall not adopt a person or be adopted without the consent of the other spouse." 15 VSA Section 431.

allows or prohibits two unmarried persons from filing a joint petition. HB 4131 simply codifies that two unmarried persons can petition to adopt a child.

### **III. THE CONSTITUTIONAL AMENDMENT DOES NOT APPLY TO HB 4131.**

The amendment to Michigan's Constitution in Article I, Section 25 is not relevant to HB 4131. The Constitutional Amendment concerns what type of union shall be recognized as marriage for any purpose. HB 4131 does not purport to recognize any type of relationship as a marriage nor does it bestow any legal recognition or status on the relationship between the adoptive parents. The only relationship addressed by HB 4131 is the relationship between an adoptive child and the child's adoptive parent. Thus, the Constitutional Amendment has no impact on HB 4131.

The Michigan Supreme Court in *National Pride at Work v Granholm et al*, 481 Mich 56 (2008) interpreted the language of the Constitutional Amendment as prohibiting public employers from providing health insurance benefits to their employees' qualified same-sex domestic partners. In reaching its decision, the Court noted that several public employers required that both an employee and his/her domestic partner provide a signed "domestic partnership agreement" as a condition to receiving health insurance coverage for the domestic partner. The agreement or affidavit required the partners to attest to various facts, among them that the partners 1) are not related by blood, 2) are not legally married to another individual, and 3) are of the same sex. *National Pride* at 72. The Court held that legal consequences arise from these agreements and that these legal consequences are evidence of a union. The Court went on to find that marriage and domestic partnership are the only relationships defined in terms of gender and not being related by blood, rendering the two unions "similar" for purposes of the Constitutional Amendment. *National Pride* at 481 Mich 73. Most important, the Court found that the employers unambiguously intended to treat same-sex relationships as similar to marriage

for the purpose of providing health insurance benefits and, in doing so, were ‘recognizing’ domestic partnerships and providing legal significance to these relationships. Thus, the Court held that because a domestic partnership is a union that is similar to a marriage, the employers may not recognize a domestic partnership for the purpose of providing domestic partnership benefits.

HB 4131 does not conflict with the *National Pride* Court’s interpretation of the Constitutional Amendment. HB 4131 does not recognize a relationship as being similar to marriage. HB 4131 merely clarifies that nothing in Michigan law prevents any two persons from filing to jointly adopt. Various combinations of individuals may jointly file to adopt, including by way of example, two friends, a mother and her son, an uncle and his niece, two nuns, two brothers. Unlike the employers in *National Pride*, HB 4131 does not recognize or give any significance to the relationship of the individuals filing jointly to adopt.

The purpose behind HB 4131 is to expand the number of potential persons who have standing to file a petition to jointly adopt, not to treat two unmarried persons as married or having a relationship that is similar to a marriage. At least one Michigan court has specifically addressed this issue and found that “[t]he only relevant consideration in this matter is each individual party’s established relationship as an adoptive parent with the children, not their relationship with each other.” *Giancaspro v. Congleton*, 2009 WL 416301, \*4 (Mich.App.) In *Giancaspro*, Defendant claimed that Plaintiff did not have parental rights with respect to minor children that Defendant had jointly adopted with Plaintiff. Plaintiff and Defendant had been in a same-sex relationship from at least 1995 through 2007, during which time the couple adopted three minor children through a Judgment of Adoption in Illinois. After the parties’ relationship ended, Plaintiff filed for custody rights in a Michigan court. The court denied custody rights

based, in part, on a belief that the adoption that took place in Illinois would not have been legal in Michigan due to the fact that the adoptive parents' relationship could not have been legally recognized in Michigan. The appeals court overruled the trial court because the only relevant relationship is that between the adoptive parents and the child. *Giancaspro* at 4. As in *Giancaspro*, HB 4131 has no bearing on the relationship between adoptive parents and neither defines the relationship nor requires that the adoptive parents have any relationship at all. Rather, HB 4131 simply provides that any two people may jointly petition to adopt a child.

#### **IV. CONCLUSION**

There is no conflict between HB 4131 and the Constitutional Amendment. HB 4131 only relates to the relationship between a parent and a child and does not purport to define any relationship between two individuals. There is no law in Michigan that restricts adoption to only married persons. Because HB 4131 is in the best interests of Michigan children and because it does not violate any Michigan law or the Michigan Constitution, we respectfully urge you to support this legislation.